

1 price to be paid for the NFL Network if it's  
2 all bundled together in this contract?

3 A Because they stipulated the most  
4 important component, which is the surcharge at  
5 [REDACTED] And then we actually get to see  
6 remittance reports that specify what the  
7 implementation of the base rate charge was.

8 The fact that it was bought  
9 pursuant to a bundle to me tells me one thing,  
10 that they got a bundled rate; that they got a  
11 cheaper rate for it. And that is borne out by  
12 the fact that DIRECTV is less than market.

13 Q Do you recall what the bundled  
14 price was for the NFL Network and the Sunday  
15 Ticket?

16 A [REDACTED] but I can't  
17 remember with more precision than that.

18 Q Does [REDACTED] sound about  
19 right?

20 A That sounds about right.

21 Q And basically the allocation  
22 between the Sunday Ticket and the NFL Network

1 was totally left at the discretion of the NFL,  
2 right?

3 A No, again, the [REDACTED] was  
4 stipulated in the contract. The only  
5 discretion that I understand they had was over  
6 the base rate.

7 Q Which was [REDACTED]

8 A Which was [REDACTED]

9 Q If you had set that at zero, this  
10 would have been a lot less expensive than the  
11 programming, right?

12 A Had the base rate been zero we  
13 would see the surcharge only at [REDACTED]  
14 that's correct.

15 Q And the base rate, if the base  
16 rate had been set at [REDACTED] then you'd have a  
17 much higher bundled rate here as well?

18 A That is correct.

19 Q And the NFL had total discretion  
20 what that price would be, what it would set  
21 that base rate as, didn't it?

22 A Again, I'm happy to assume that.

1 I'm reluctant to say that I know that as a  
2 matter of contract because I'm an economist.  
3 But I'm happy to grant you that for the  
4 purposes of the next question.

5 Q Sure. Why don't we look at the  
6 contract. This is Comcast 321, if I may Your  
7 Honor.

8 JUDGE SIPPEL: Three twenty one.  
9 And let's describe this. Again we are on the  
10 letterhead of National Football League, dated  
11 November 8, 2004. We haven't seen this  
12 before, have we? Or have we?

13 MR. BURKE: I don't believe we  
14 have, Your Honor, although it was marked and  
15 admitted as a Comcast exhibit.

16 JUDGE SIPPEL: Well, if it was  
17 already marked and admitted -

18 MR. BURKE: I'm sorry.

19 JUDGE SIPPEL: Hold on just a  
20 second. Yes, it's the same document, Comcast  
21 321. Yes, we already have this in.

22 MR. BURKE: Okay, great, that's

1     what we thought, Your Honor.

2                   JUDGE SIPPEL:     So you can give  
3     him a copy of it.

4                   MR. BURKE:     We just brought our  
5     two copies, because we didn't know if people  
6     would have it.

7                   JUDGE SIPPEL:     Appreciate it.

8                   BY MR. BURKE:

9           Q     First off, do you recognize this  
10    document, Dr. Singer?

11          A     I believe I do, yes.

12          Q     And so you reviewed this in part  
13    of your preparation of your work on this  
14    matter?

15          A     Yes, I did.

16          Q     And I want to point you to page  
17    two of the actual agreement, and it's Section  
18    2, rights fees, NFL Network.

19          A     Yes, I'm there.

20          Q     In 2a, it says total nominal  
21    payment of [REDACTED] for all rights  
22    described herein except for NFL Network

1 surcharges. Do you see that?

2 A A very important section, yes.

3 Q For a 5-year period, so that the  
4 bundled price for the NFL Network and the  
5 Sunday Ticket is [REDACTED] putting aside  
6 the game surcharge; right?

7 A Correct.

8 Q So for this [REDACTED] price,  
9 DIRECTV got two things. It got, first, the  
10 Sunday Ticket, and secondly, it got the NFL  
11 Network, it got the games, the base price of  
12 the NFL Network, right?

13 A I would say they also got the NFL  
14 - with that - okay, that is a fair  
15 characterization. They certainly have the  
16 rights to the games as well on the eight-game  
17 package.

18 Q So then if we go to 2b, it says,  
19 basic NFL network carriage fees, i.e. carriage  
20 fees other than the surcharge for carriage of  
21 live regular games, for the period listed, may  
22 be determined by NFL enterprises in its

1 reasonable discretion; do you see that?

2 JUDGE SIPPEL: Where are you  
3 reading from?

4 MR. BURKE: I'm sorry, from 2b,  
5 Your Honor.

6 JUDGE SIPPEL: On the next page?

7 MR. BURKE: No, it's on the same  
8 page.

9 JUDGE SIPPEL: I have it, thank  
10 you.

11 BY MR. BURKE:

12 Q But just to read it again, it  
13 says, basic NFL Network carriage fees. That  
14 is the base rate that DIRECTV has to pay for  
15 the NFL Network, right?

16 A Correct.

17 Q Those basic fees may be determined  
18 by the NFL Enterprises in its reasonable  
19 discretion; do you see that?

20 A Yes.

21 Q So what that is saying is, the NFL  
22 can set that base rate at any point it wants,

1 whether it's [REDACTED]  
2 right?

3 A Yes, it has a certain amount of  
4 discretion to set the base fee that is layered  
5 on top of the [REDACTED] surcharge.

6 Q And then it says, DIRECTV's  
7 payments to NFL Enterprises in respect of any  
8 basic carriage fees will be credited against  
9 the rights specified in 2a. Do you see that?

10 A Right.

11 Q So do you understand that to mean  
12 that whatever the base rate is paid, will be  
13 credited as part of the [REDACTED] right?

14 A Yes.

15 Q So isn't it completely arbitrary  
16 what the NFL sets that base rate at? It could  
17 have been any number, and it would all just  
18 come out of the [REDACTED] one way or  
19 another?

20 A It's not arbitrary. Look at where  
21 it ended up setting it. I grant you that they  
22 had discretion to set it arbitrarily. But at

1 the end of the day they brought DIRECTV to  
2 market.

3 The way that I would explain this  
4 to you is that the [REDACTED] was well below  
5 market rate for the surcharge, right? If  
6 everyone is paying [REDACTED] why is DIRECTV  
7 getting the surcharge for [REDACTED] The  
8 answer is, because it was part of a bundled  
9 rebate, and when they have to come up with the  
10 rate they add back on [REDACTED] and look where  
11 it takes them? It takes them back to market.

12 Q Or, isn't it equally plausible to  
13 infer, Dr. Singer, that the NFL wants to make  
14 the NFL DIRECTV rate as high as possible so it  
15 can justify a high rate for MVPDs?

16 A There is a - that is a double-  
17 edged sword. Because as they move money from  
18 the [REDACTED] towards the NFL Network to allegedly -  
19 I don't think they are doing this, but if  
20 that was their strategy was to get DIRECTV  
21 signed, which by the way occurred after Dish  
22 Network had established the lower price - if



1     that is their strategy, it is a double-edged  
2     sword. As you move money towards NFL Network  
3     you are taking away money from the ticket.  
4     And as you know the ticket renewal comes up  
5     every few years as well. And I'm fairly  
6     confident that the NFL Network when  
7     negotiating with Comcast and Time Warner  
8     jointly for the NFL ticket loves to be able to  
9     point to a very high number for the NFL  
10    ticket, for when they are negotiating those  
11    rights on a going forward basis.

12           Q       How would Comcast even know what  
13    DIRECTV is paying for the Sunday Ticket? I  
14    mean this is a highly confidential document,  
15    isn't it?

16           A       This document is confidential, but  
17    I can't rule out the possibility that the  
18    amount that NFL Network got for the ticket  
19    never made it into the public domain; I can't  
20    rule that out.

21           Q       But this allocation as between  
22    whether you are going to put it into Peter's

1 pocket or Paul's pocket here, whether you are  
2 going to allocate it to the base rate or to  
3 the NFL Sunday Ticket, Comcast has no  
4 visibility into that. How would Comcast ever  
5 know that?

6 A Well, I would think that when  
7 Comcast went to negotiate with NFL at the  
8 renewal for the ticket that it would be  
9 reasonable for them to ask what the price was  
10 for the last ticket, and it would be  
11 disingenuous for the NFL to claim credit for  
12 the [REDACTED] if in fact it allocated a certain  
13 percentage of that over to a different pot.

14 But you are asking me how does it  
15 happen? I've never sat through one of those  
16 negotiations. I don't know how they happen.

17 Q So you really are speculating,  
18 right, Dr. Singer?

19 A I'm not - I don't know if I'm  
20 speculating. You asked me do they have  
21 incentives to game the system by jacking up  
22 the base rate so as to get a higher - if I

1 understand you right - so as to get a higher  
2 DIRECTV price for the NFL Network, and then  
3 shot that price around.

4 And I'm just pointing out that  
5 it's a double-edged sword. And the second  
6 thing I'm pointing out is that a lot of these  
7 deals were cut before the DIRECTV deal.

8 Q There is no specification of what  
9 the base rate is in this contract. It is  
10 purely at the NFL discretion, right?

11 A It's at the discretion, but we see  
12 how much discretion they exerted.

13 Q And the NFL has an incentive, for  
14 the purposes of this litigation and otherwise,  
15 to make the base rate that DIRECTV is paying  
16 appear as high as possible, doesn't it?

17 A I can't accept the notion that  
18 this litigation had anything to do with how  
19 they allocated and calculated the remittance  
20 reports; I can't accept that.

21 Q Well, don't they have an incentive  
22 to make it appear as high as possible?

1           A       I think ex post, now that we are  
2   haggling over the right price, it certainly  
3   benefits the NFL Network to have [REDACTED] in  
4   there as opposed to [REDACTED] But whether or not  
5   they did the allocation with that in mind I  
6   can't speak to that, in fact it seems  
7   unlikely.

8           Q       All right, but you don't have any  
9   personal knowledge one way or the other?

10          A       They'd have to have amazing  
11   foresight to do that.

12          Q       Well, they can increase the base  
13   rate too, right?

14          A       You can't go back and - I'm  
15   dealing with a set of documents, remittance  
16   reports from 2004. I don't know how the NFL  
17   could go back in time and arbitrarily move  
18   things around so that their expert could get  
19   a higher number.

20          Q       Those remittance reports reflect  
21   the fact that the base rate is increasing over  
22   time, don't they?

1           A       Sure, as they are for everyone.

2           Q       And how does that increase - there  
3 is no formula in this contract for how that  
4 increase occurs. It just happens at the  
5 discretion of the NFL, right?

6           A       It happens at the discretion, but  
7 to the best of my ability as an economist,  
8 what I think the NFL is doing is that they are  
9 trying to get back up for the extreme rebate  
10 that DIRECTV got for the surcharge. If you  
11 look at the price of the surcharge, you have  
12 this [REDACTED]

13 [REDACTED] What I think  
14 they are doing is, they're marking it to  
15 market. They're putting a rate that puts it  
16 at [REDACTED] I think that is what they are doing.

17          Q       But you don't have any personal  
18 knowledge one way or the other of why they are  
19 doing it?

20          A       I don't have personal knowledge of  
21 why they are doing it.

22          Q       This is totally speculation on

1 your part, right?

2 A It's not speculation. I'm giving  
3 you an economic interpretation of why I think  
4 they are doing it.

5 Q So you had no conversations with  
6 anyone at the NFL Network about how they set -  
7 or the NFL for that matter - about how they  
8 set this base rate for DIRECTV?

9 A I can't recall specifics of any  
10 conversation on that.

11 Q For example, did you ask them are  
12 there any studies that support your selection  
13 of [REDACTED] as the base rate?

14 A I would never ask that question  
15 because there wouldn't be a study to support  
16 that.

17 Q So you didn't ask the question?

18 A Not that question.

19 Q You didn't ask for any  
20 documentation to support why the NFL selected  
21 [REDACTED] as its base rate in its discretion?

22 A No, I did not.

1           Q       Okay. I want to talk a little  
2 bit, to change the subject for a moment -

3           JUDGE SIPPEL:   Well, before you  
4 do, am I understand that the base rate - I'm  
5 talking about this exhibit now, the numbers  
6 here on number two, rights, fees, et cetera,  
7 that the base rate is [REDACTED] so the  
8 surcharge would be what, it would be [REDACTED]  
9 An I right?

10           THE WITNESS:   Right. If you were  
11 to decompose the DIRECTV rate, and it looks  
12 like it's about 61 cents.

13           JUDGE SIPPEL:   Yes, that's what  
14 we talked about yesterday.

15           THE WITNESS:   So for DIRECTV,  
16 which I think is a very special case -

17           JUDGE SIPPEL:   DIRECTV, yes.

18           THE WITNESS:   It's a very special  
19 case.

20           JUDGE SIPPEL:   Right, it's very  
21 elaborate one.

22           THE WITNESS:   The allocation is

1 [REDACTED] for the surcharge and the residual to  
2 the base. Now there could also be marketing  
3 subsidy that I don't want to rule out too. We  
4 have to go into my Excel spreadsheet that  
5 shows you the decomposition of the [REDACTED] But I  
6 think it's fair to say as a first cut, [REDACTED]  
7 cents and [REDACTED]

8 JUDGE SIPPEL: [REDACTED] All  
9 right. Okay, thank you. I just want to be  
10 sure of my scorecard. Thank you.

11 MR. BURKE: Just a few final  
12 questions and then we'll finish up. Your  
13 Honor, you were thinking about finishing up  
14 around noon today?

15 JUDGE SIPPEL: That's all up to  
16 the good doctor.

17 MR. BURKE: I think we can finish  
18 this up in about 10 minutes.

19 BY MR. BURKE:

20 Q Dr. Singer, you rely upon an  
21 economic theory that is referred to as raising  
22 rivals' cost. Do you remember that?



1 A Yes.

2 Q And that is basically an antitrust  
3 theory, right?

4 A It is an antitrust theory; it is.

5 Q And you actually used that theory  
6 at one point to analyze vertical foreclosure  
7 of local programming in an article you wrote  
8 with Dr. Sidak; do you remember that?

9 A I've written several with him.  
10 I'm not sure if you are talking about the  
11 Internet one or the video programming one; I'm  
12 sorry.

13 Q I think you referred, when earlier  
14 in your direct testimony, to an article you  
15 had written with Dr. Sidak concerning vertical  
16 foreclosure theories using this concept of  
17 raising rivals' costs.

18 Which article were you referring  
19 to then?

20 A Oh, I probably was referring to  
21 the Journal of Network Economics article.

22 Q Is it Review of Network Economics?

1           A       That sounds right.

2           Q       And when you wrote that article,  
3   you were applying this concept of raising  
4   rivals' cost, that antitrust theory, to  
5   vertical foreclosure, in video programming  
6   markets, right?

7           A       I wouldn't say that is the thrust  
8   of the article, but it's possible that I  
9   employed raising rivals' cost as the theory in  
10  that article.

11          Q       Was there some other economic  
12  theory that you applied in that article?

13          A       Yes, I'm happy to -

14          Q       Is there a name for it or some  
15  shorthand -

16          A       Well, when you - I think we were  
17  looking at regional sports programming. I'm  
18  sure you will remind me. I think it was based  
19  on my work in the MASN case.

20                   The MASN was threatened with a  
21  refusal to be carried in the Washington DMA,  
22  and that conduct or that exclusionary conduct

1 didn't necessarily raise MASN's cost, it just  
2 prevented them from achieving certain scale  
3 that would otherwise induce them to exit the  
4 market.

5 Q Just out of curiosity, has the NFL  
6 reached its minimum viable scale, NFL Network?

7 A I haven't studied that particular  
8 issue, but I think it's fair to assume that  
9 they have reached a minimum viable scale.

10 Q Now in your article on vertical  
11 foreclosure, and why don't we just distributed  
12 so everyone has it.

13 MR. BURKE: If I may, Your Honor,  
14 this is marked for identification Comcast  
15 Exhibit 426. It's an article by Dr. Singer  
16 entitled vertical foreclosure in video  
17 programming markets.

18 JUDGE SIPPEL: So marked.  
19 (Whereupon the aforementioned  
20 document was marked for  
21 identification as Comcast Exhibit  
22 No. 426)

1 JUDGE SIPPEL: What is the date  
2 on that?

3 MR. BURKE: September, 2007.

4 JUDGE SIPPEL: That will be  
5 marked then as Comcast Exhibit No. 426 for  
6 identification.

7 BY MR. BURKE:

8 Q Dr. Singer, can you identify this  
9 document?

10 A Yes, I can.

11 Q This is the article that we were  
12 just talking about, right?

13 A Correct.

14 Q If you turn to the last - actually  
15 page 391, your conclusions. I wanted to read  
16 the first two sentences of your conclusion.

17 You say, vertical foreclosure  
18 theories depend critically on the relevant  
19 geographic market. A local downstream access  
20 provider, whether it is a cable television  
21 provider or a cable modem provider, lacks the  
22 ability to foreclose an upstream content

1 provider that generates content with  
2 nationwide appeal.

3 See that?

4 A Yes.

5 Q And is it your view that NFL  
6 Network is an upstream content provider that  
7 generates content with nationwide appeal?

8 A Yes.

9 Q So doesn't this conclusion  
10 indicate that it's impossible for a local  
11 access provider like Comcast to successfully  
12 foreclose the NFL Network?

13 A What I will grant you is that if  
14 this were antitrust case, and we were arguing  
15 the case under the antitrust laws, the  
16 foreclosure share, which is - to the extent to  
17 which Comcast can block NFL from its potential  
18 audience would become a very important  
19 element.

20 You don't like when I weigh in on  
21 the law, but I understand that we are trying  
22 to form here a second prong of the

1 discrimination statute as to whether or not  
2 NFL has been impaired in its ability to  
3 compete.

4 JUDGE SIPPEL: What page are you  
5 on?

6 MR. BURKE: This is 391, Your  
7 Honor.

8 BY MR. BURKE:

9 Q So you would agree that Comcast  
10 lacks the ability to foreclose the NFL Network  
11 under the theory that you advanced in this  
12 article?

13 A No, I wouldn't agree to that.  
14 What I would say is that if this case were an  
15 antitrust case, and we were proceeding in an  
16 antitrust court, then the foreclosure share  
17 would be more important, and this is the most  
18 important thing, that the effect on consumers  
19 and - would be elevated.

20 Q So you have done no - have you  
21 made any efforts to determine the so-called  
22 foreclosure share that you just referenced?

1 A Yes, I have.

2 Q And what is that?

3 A Well, it's the maximum number of  
4 homes that Comcast can shut NFL down from.

5 Q And that is about [REDACTED]  
6 homes?

7 A It's the largest NVPD in the  
8 country, yes.

9 Q But there are how many other homes  
10 left after you take out the Comcast? [REDACTED]  
11 [REDACTED] or more, right?

12 A Right.

13 Q So how can Comcast unfairly  
14 prevent the NFL Network from selling its  
15 products when [REDACTED] of the market is wide  
16 open to the NFL Network?

17 A So - and I'll grant you this, in  
18 an antitrust case we are right at the edge of  
19 what Professor Hovencamp, who writes the  
20 antitrust treatise, would say is the  
21 threshold. The threshold is about 20  
22 foreclosure share. And so Hovencamp would say

1     that that is sufficiently large, to make the  
2     presumption of anticompetitive impact that has  
3     harmed consumers, absent any strong showing of  
4     efficiencies.

5                     But I grant you, just want to be  
6     completely up front, the 23 percent is close  
7     to the threshold that I understand is  
8     governing in the antitrust case law, but has  
9     no import here.

10            Q     Again, Dr. Singer, are you giving  
11     us legal advice as to what the standard of  
12     review is here?

13            A     I'm just trying to help you out.

14            Q     You told us a little while ago  
15     that the theory that you are relying upon  
16     relates to antitrust theory. Didn't you do  
17     that just five minutes ago?

18            A     No. Let me just make sure that we  
19     are on the same page here. When an economist  
20     develops theoretical models - when an  
21     economist develops theoretical models of  
22     vertical foreclosure, they do not write



1 separate models for a regulation case as they  
2 do for a an antitrust case. They have to go  
3 with models that are out there, and these  
4 models were largely developed for antitrust  
5 cases.

6 Q I guess I'm asking you to testify  
7 as an economist about if you want to determine  
8 whether there is an adverse effect on  
9 competition or consumers, you have to look to  
10 the foreclosure share, don't you?

11 A On consumers, yes, you would.

12 Q And you referenced Professor  
13 Hovencamp's 20 percent tests; remember that?

14 A That is one test that is out  
15 there.

16 Q Wasn't there another element of  
17 Professor Hovencamp's test that the market had  
18 to be highly concentrated with an HHI over  
19 1,800?

20 A Well, that's not the second  
21 element. It might be in Hovencamp's, but what  
22 the economist is looking for is a combination

1 of two things. For an antitrust case -

2 Q Please answer about Professor  
3 Hovencamp's test. You don't know the answer?

4 A I don't know the answer.

5 Q That's fine. Did you do any  
6 empirical analysis of whether advertising  
7 prices have risen as a consequence of Comcast  
8 decision to tier the NFL Network?

9 A I looked at advertising rates, but  
10 the problem is that I have about five  
11 datapoints in time, which is what Golf is  
12 charging and Versus is charging in 2000, 2001,  
13 2002, 2005, and I just don't think that with  
14 that database I have enough information to  
15 project a but-for series of advertising rates  
16 for Golf.

17 What I can confidently infer based  
18 on the large economies of share here, and the  
19 large foreclosure share is that a pricing  
20 constraint otherwise imposed by the NFL on  
21 those advertising rates has been impaired; has  
22 been weakened.